No. 14846

United States
COURT OF APPEALS
for the Ninth Circuit

LEO ELWERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

Honorable William J. Lindberg, Judge.

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PRELIMINARY STATEMENT

A

The tabulation on page 15 of Appellee's Brief, titled "Income Tax", is inaccurate.

The additional tax liability for **1947**, as computed by the Government's expert, is not $6835.15. It is $5229.76. Mytinger testififed (Tr. 703),

> "A. I have recomputed the tax liability in the amount of $17,505.78.

Q. What is the amount shown on the exhibit? (return).
A. $10,670.63."

The difference between the two, is $5229.76.

The additional tax liability for **1948,** computed by the Government's expert, is not $9787.04. It is **$623.81.** The expert testified (Tr. 709-710), that the joint tax liability for the year **1948,** as computed by him, was $6831.38, and that the joint tax liability shown on the return was $5583.76 (Tr. 709-710). The increase in **joint** tax liability, as computed by the expert, is $1247.62. **One-half** of that **amount,** to-wit, **$623.81,** would be appellant's **additional** tax liability for **1948** according to the Government's expert (Tr. 709-710).

The tax liability of $657.08 for **1949,** shown in the tabulation, as computed by the Government's expert, is the **total** tax liability, **not additional** liability.

The tabulation, according to the expert's computation should be as follows:

1947	$5,229.76	Additional
1948	623.81	Additional
1949	657.08	Total for the year.

B

Table IV, P. 70, Appendix to Appellee's Brief is not additional unreported income. The capital gains from the transactions shown in that Table are already reflected in the prior tables. Only the capital gains from said transactions are material

I.

RE SUFFICIENCY OF INDICTMENT

A

Re All Counts

Appellee's brief evades the issue tendered by appellant in connection with the sufficiency of all three counts of the indictment.

The specific deficiency common to all three counts urged by appellant, is the **failure to allege in the indictment the existence of a specific intent** on the part of the defendant to evade the tax.

Appellant's contention is that since it is now settled beyond question that specific intent to evade is an essential element of the offense **(Bloch v. United States, 221 F. 2d 786, 9th Cir.)**, the existence of that specific intent must be alleged in the indictment. It is not alleged in any of the counts in this case.

Appellant argues it is not necessary to allege the "means" by which the evasion was to be accomplished. Appellant does not so contend. The allegation of "specific intent" is not the same as an allegation of the "means".

The question of the necessity of an allegation of "intent" was not raised by the defendant or passed upon by the Court in any of the cases cited by appellee. Not a single case it cited in which it has been held that the allegation of intent is unnecessary to a valid indictment for attempted tax evasion.

B
Re Count III

The sufficiency of Count III was challenged on the additional substantive ground that the failure to file an income tax return and to pay a tax, does not in and of itself constitute a violation of Section 145(b). **(Spies case** and cases cited, pages 9 to 12, Appellant's former brief).

Count III was sustained in the Court below because it contained the additional phrase:

> "And by concealing and attempting to conceal . . . his true and correct gross and net income . . ."

No facts are alleged from which it can be determined whether the concealment was accomplished by **"affirmative acts"** or by silence.

Appellant contended, in the Court below, and contends here, that the bare allegation that defendant "concealed" or "attempted to conceal" without statement of the facts, is a **"conclusion"** merely and insufficient to charge the commission of an **"affirmative"** act of the character described in the **Spies case** as essential to the validity of a charge of evasion.

Appellee's brief evades this contention. Not a single case is cited in which it was held that the bare allegation of concealment without the allegation of any facts, was held to be sufficient to

charge evasion by concealment and no case is cited in which it was held that a bare allegation of concealment constitutes the allegation of an **"affirmative"** act which would be equivalent to a charge of attempted evasion within the purview of the **Spies case.**

The case of **United States v. Smith, 206 F. 2d 905,** cited by appellee at this point, is irrelevant. The Court merely passed upon the **sufficiency of the evidence.** The question sufficiency of the indictment was not raised, discussed or passed upon by the Court.

In the case of **Sens v. United States, 212 F. 2d 795,** cited by appellee, the brief per curiam opinion recites:

> "And it appearing that the indictment in addition to willful failure to file a return charged that appellant during the taxable year performed **various acts which constituted** evidence of an **affirmative,** willful attempt to evade or defeat the payment of the tax . . ."

The indictment in that case **did allege the commission of "affirmative" acts** constituting evasion. The indictment in that case did not charge the mere **conclusion** that the defendant "concealed" or "attempted to conceal" his income. The allegation of concealment without more in the case at bar, is a bare conclusion **(United States v. Fuselier, 46 F. 2d 568),** and is, therefore, **"insufficient in law to compel defendants to meet them as a criminal charge."**

In **United States v. Kafes, 214 F. 2d 887**, cited by appllee, the indictment charged, **in one count,** violation of Section 145(a) (failure to file a return), and in **separate count,** a violation of 145(b) (evasion). The indictment **did not charge in one count tax evasion** by failure to file a return as in the case at bar.

The sufficiency of the indictment was not challenged in that case and the Court did not discuss or pass upon the sufficiency of the allegations to charge an offense under either of the statutes.

The Court in that case pointed out that attempted evasion can be charged by showing a failure to file a return "**plus other affirmative acts.**" (Citing the **Spies case.)**

Count III of the indictment in the case at bar does not charge the commission of any "affirmative" acts in addition to the failure to file a return. The allegation of concealment without facts is not an allegation of the commission of an **affirmative act.**

II.

Re Insufficiency of the Evidence to Support the Judgment.

The case is argued on behalf of the Government as though all of the exculpatory evidence and the evidence of allowable deductions and the over-statement of income in 1949 unsigned return, is non-existent notwithstanding that it is a part of the Government's case.

No attempt is made to demonstrate that there is any evidence that appellant **knew** that his individual returns for 1947 and 1948 were inaccurate or false. No evidence is referred to from which such **scienter** can be inferred beyond a reasonable doubt. There is no evidence in the record that defendant signed these two individual returns and appellee does not point to any evidence of the circumstances surrounding the delivery of these two returns to the appellant for signature. Appellee does not point to evidence as to what transpired when Cook delivered the 1947 return to defendant and Hammond delivered the 1948 return to the defendant for signature. Appellee does not point to any evidence of any conversations pertaining to the figures shown on the return or that defendant made any inquiry as to what they represented, what was included or what was omitted, or the basis on which the returns were prepared. There is not the slightest intimation in the evidence that defendant knew what records were examined by the accountants in the preparation of the returns. In short, there is not the slightest bit of evidence from which knowledge of any inaccuracy in the returns could be imputed to the defendant. Defendant was not only unaware that items of income were not included, **but what is more important, he was unaware that many thousands of dollars of allowable deductions were not taken and he was unaware that in the 1949 return, which was not signed or filed, the accountant had over-stated the income**

for that year by nineteen to twenty thousands dollars.

The Supreme Court has said, "without knowledge, there can be no intent, and without intent, there can be no offense," under the statute on which the indictment is predicated.

There was no issue of fact with respect to the exculpatory evidence and the evidence of allowable deductions. It all came from the Government's witnesses.

RE COUNT III

A

Failure to File 1949 Return

Appellant contends that the failure to file the **1949** return was due to the fact that the accountant had failed to submit the return to defendant for signature and filing and that defendant was unaware that the return had not been filed. We made this contention because the Government's testimony establishes that the **original** returns (partnership and individual), prepared by Hammond, were found in Hammond's possession. Revenue Agent Menlow obtained the returns from Hammond. The Government's case establishes that Hammond did not deliver the returns to defendant for signature and filing. **Revenue Agent Menlow testified** with respect to the 1949 returns that Exhibit 44 was a photostatic copy of the **original** individual return. He testified (Tr. 577):

"Q. Did you see the originals from which these photostats were taken?

A. Yes, sir.

Q. And where did you obtain the originals from which those photostats were taken?

A. **They were in the boxes or records we received from Mr. Hammond.**

Q. Were those among the records that were turned over to you in either February, 1951, or at the end of the year, when you picked up the second batch of records?

A. They were in the boxes."

Government's witness Hammond testified (Tr. 227-228) that the photostatic copies of the 1949 returns were copies of the returns which he prepared.

"MR. MEAD: **These returns were furnished by you to the Government** for the purpose of taking these photostatic copies; is that correct?

A. Yes."

Appellee attempts to explain Hammond's possession of the returns by **speculating** that they **might** have been returned to Hammond.

The Government had the opportunity to obtain an explanation from Hammond as to how he came into possession of the returns. No such explanation was called for or given. He did not testify that he later obtained the returns from appellant.

We submit that the positive affirmative evidence of Hammond's possession of the returns and the effect thereof upon the question whether he gave the returns to Mr. and Mrs. Elwert, cannot

be dissipated by indulging in speculation that the returns **might** have been returned to Hammond.

If the returns had been left with Mr. and Mrs. Elwert for signature and were later returned to Hammond unsigned, he certainly would have been greatly concerned about the matter. He would have made inquiry as to why they had not been signed and filed and would have arranged for the signing and filing at the time of discovery. There is no such evidence in the record.

In any event, the admitted over-statement of income in the unsigned 1949 return, which was used as the starting point for the computation of the alleged tax deficiency, wipes out entirely any taxable net income. It establishes a loss for the year and creates a substantial loss carry back to 1947 and 1948 as already demonstrated, to say nothing of the additional allowable deductions appellant failed to take.

B

Re Deductions

Appellee does not meet the issue relating to the allowable deductions.

Appellant does not contend that the burden is on the Government to prove the non-existence (a negative) of allowable deductions. We contend that the Government's case affirmatively established the existence of the allowable deductions as a mat-

ter of law and there was no issue of fact in that respect.

The existence of allowable deductions, is material for two purposes:

(a) To establish that there was no tax liability if the allowable deductions not taken in the returns exceed the established unreported income;

and

(b) The extent of allowable deductions not taken in the returns, negatives as a matter of law the intent to evade the tax under the facts established by the Government's case.

In the case at bar, the Government's case established affirmatively:

(a) The existence of the deductions;
(b) The amount thereof;
(c) The relation to the alleged unreported income; and
(d) The effect on the tax liability for each year.

At the close of the Government's case and at the close of the entire case, it was not a question whether there "might" be allowable deductions. The Government's witnesses established the existence of the deductions and all related factors. The issue did not depend upon determination of contradiction between evidence of the Government and the evidence introduced by defendant. The only evidence introduced by defendant merely corroborated the testimony of the Government's witness.

Hammond testified that a comparision of the 1949 unsigned return and the very same records

from which he made the return, shows an over-statement of income of between $19,000.00 and $20,000.00 (Tr. 301-302). He was unaware of this over-statement. Revenue Agent Menlow called it to his attention when Menlow was investigating defendant's return on June 6, 1952, at which time Menlow took Hammond's deposition (Tr. 325-326-327). He testified (Tr. 327):

> "Q. Was that the first time, then, that you knew there was any error in the '49 return with regard to an overstatement of receipts or an overstatement of expenses?
> A. As I recall, yes, it was."

Asbahr, the Government's witness testified that in 1948 defendant sustained a loss of $22,000.00 on the loan to the Denton Construction Co. (Tr. 495 to 498). Appellee's Brief attempts to create some doubt about this matter by asking why the three notes, testified to by Asbahr, were not produced. This is a very unfair observation. The Government served on Asbahr a subpoena duces tecum. The Court file shows that subpoena. When Asbahr testified, he had before him his file of documents pertaining to appellant's transactions. In fact, he gave most of his testimony from the file and it is a fair inference that if Government's Counsel, who tried the case, entertained any doubt as to the truthfulness of Mr. Asbahr's testimony, he would have called upon him to produce all the documents pertaining to the tranaction.

All of the other deductions enumerated in Appellant's former Brief, were established by the

Government's case with equal certainty by the Government's witnesses.

This evidence destroyed the Government's case for it established:

(a) That there was no tax liability in any of the three years in question; and

(b) That there was a failure to take allowable deductions to such an enormous extent as to preclude any possibility that there could have been any intention to evade the tax at the time that the 1947 and 1948 returns were signed and filed, or that the failure to file the return for 1949 was due to such an intent.

The cases cited by appellee with respect to the question of deductions are not at all relevant.

In **United States v. Stayback, 212 F. 2d 313,** cited by appellee, the Court merely held that the Government was not compelled to establish the existence of allowable deductions beyond those shown in the defendant's return "and others that it can calculate without his assitance."

The Government's case establishes the existence of allowable deductions in excess of the amount of deficiencies computed by the Government's expert, that the deductions were so extensive, as to dissipate as a matter of law an inference or suspicion of an "intent" to evade the tax. These established facts made it compulsory to grant the motions for a judgment of acquittal as to all three counts.

The case of **United States v. Bender, 218 F. 2d 869,** cited by appellee, is irrelevant for the same

reason. The case did not involve the effect to be given to exculpatory evidence appearing as a part and parcel of the Government's case or the effect to be given to the evidence of allowable deductions established as a part of the Government's case.

The case of **Clark v. United States, 211 F. 2d 100,** cited by Appellee, is not at all in point. In that case, the question of the existence of allowable deductions became a question of fact because the testimony of the Government's witnesses and the testimony of the defendant's witnesses was contradictory with respect to the existence and amount of allowable deductions. There was also dispute as to whether some of the deductions claimed by defendant were, or were not, included in the deductions which he did take in the return under the heading of "Costs of operation or business expenses." It was not a case in which the existence of allowable deductions was established by and through the Government's own witnesses, some of it on dircet examination and some on cross-examination.

In the case at bar, the testimony of the Government's witnesses did not merely establish that deductions "may" exist. The evidence established that they **did** exist.

The Court in that case concluded with the significant statement as follows:

> "Also, there was here no such establishment of omitted proper deductions, through cross-ex-

amination of the Government's witnesses or on the evidence of appellant, as **legally destroyed the Government's prima facie case of existence of unreported taxable income and of willfulness in connection therewith."**

The Court recognized that the existence of allowable deductions not taken in the return, can be established **as a matter of law** by the examination of the Government's witnesses and when that is done, the prima facie case, if any existed, is dissipated.

The witness Asbahr testified that the reason for defendant's handling of some of his business transactions through Mr. Asbahr's office was due to:

(a) The threats and the litigation involving the claim for alienation of affections; and

(b) The trouble that he had with his wife which resulted in the appropriation of the bank accounts by his wife and his inability to carry on business through bank accounts in the normal manner.

He testified (Tr. 485):

"A. At the time I believe the purpose was for me to hold this money temporarily, and later he was going to have it applied on account of some other transaction that he was interested in. Incidentally, he had domestic troubles at that time, and he was complaining that his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds."

. . . . .

(Tr. 492)

"A. Well, he was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached, or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody.

Q. Did he then act upon your advice and the advice that had been given him by Mr. Maynard and make that transfer?

A. I presume he did. I didn't follow it up.

Q. You don't know what he did?

A. I don't know. I didn't follow it up.

Q. But you recall definitely that he discussed it, do you?

A. Yes, he counseled with me about it."

Government's witness Schmidt testified (Tr. 182):

"A. Well, it seemed like at that time he was having some difficulties with his wife, and that his bank account had been attached, or she had taken it out, or something. I don't recall just what the circumstances were.

. . . . .

A. He was putting money in that name so he would—his own money. In other words, that money that he put in that name he could get in touch with.

. . . . .

(Tr. 183)

A. Well, I don't know just how it happened

there, but apparently he didn't have any more access to any bank accounts that he had before."

With respect to the cashing of checks, he testified (Tr. 188):

"Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by Winos, Mr. Schmidt?

A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that itinerant help.

Q. Was this particularly during the harvest season and the planting season of the year?

A. Yes."

The Government's witness Cook testified that the bank account in the Tigard Branch of The United States National Bank was in the name of appellant and his wife until the threats and the alienation action was brought in November 1946 (Tr. 34-35). The transfer of the account to Mary Elwert's name alone was made by reason of the threat of the lawsuit (Tr. 35).

This evidence must be given effect in appraising the Government's evidence to determine whether it made out a prima facie case.

The case of **Canton v. United States, 226 F. 2d 313,** cited by appellee, is not in point. In that case, the question whether the defendant was entitled to

take certain deductions which were not taken in the return, presented a sharp issue of fact. The defendant claimed deductions totaling $11,259.07. Included in that sum was a total of $7,978.55 for expense incurred as living expense while defendant, who was a resident of Minnesota, was staying at Drain, Oregon, looking after the business of an independent corporation in which he had a stock interest. The question arose whether the expense incurred was his own individual expense or expense chargeable to the corporation. If the latter, it was not allowable as a deduction. There was divergent testimony on that issue and the Court held that it was proper to submit that issue of fact to the jury for determination.

In the case at bar, the testimony does not present any issue of fact as to the deductions and the explanations for the apparently irregular transactions or the overstatement of income in the returns used as a basis for computation. All of the evidence came from Government's witnesses in the Government's case.

C

Re Bank Accounts In Assumed Names

There were no bank accounts in assumed names until **January 27, 1949.** The opening of the accounts in assumed names in 1949 could not, of course, have any bearing on the tax years **1947 and 1948** (Counts I and II).

The Government's case establishes the reason for the opening of accounts under assumed names in 1949.

The first account that appellant had at the Pacific First Federal Savings & Loan Association, was opened July 2, 1946, Account No. 78660. **This account was opened and carried in defendant's own name** (Tr. 476). The account was closed on **January 27, 1949,** and the entire balance was transferred to a new account at the same bank under the name of "Schamburg", account No. 94299 (Tr. 477). The reason for this change will be presently shown.

The second account was opened **February 25, 1949,** under the name of "Albee", No. 94380.

The third account was opened **June 22, 1949,** under the name of "Albee or Bloomquist", Account No. 94635.

The Government's witnesses Maynard and Asbahr testified to the **reason** for the transfer of the account from appellant's own name to that of a ficitious name and subsequent opening of the other two accounts in assumed names. Maynard testified (Tr. 478) that Elwert "closed the account that was in his name and with that deposit opened this Schamburg account." Elwert discussed with Maynard the matter of closing his personal account. He told Maynard he was going to withdraw the account and that he was concerned about the possibility of someone identifying his account. **Maynard made the suggestian that if he wanted to have an**

account in an assumed name, that was possible (Tr. 479-480). Maynard suggested to Elwert that he could re-deposit the monies in another name (Tr. 480), and a few days after that conversation, after consulting his attorney, Elwert came back and established the Schamburg account (Tr. 480).

Government's witness Asbahr testified that he was an attorney; that he had practiced law since 1917 and he became acquainted with Elwert in the 1940's (Tr. 489); that Elwert had delivered money to him to hold temporarily to be applied later on account of some other transactions he was interested in (Tr. 485). He testified that Elwert had domestic troubles at the time. He was complaining about his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds (Tr. 485). Some of the money was applied to the purchase of a home for Elwert's own use (Tr. 490). He testified that Elwert

> "had a good deal of domestic trouble and had left his home, I think, before this time." (Tr. 490).

The charge of attempted evasion is in part predicated on the failure of the returns to reflect the capital gains from the sale of the timber land to Dant & Russell in 1948. The contention is made by the Government that appellant did not inform the accountant Hammond about the transaction and Hammond did not reflect the transaction in the return because he had no knowledge of it.

The marital trouble involved him in litigation. A divorce action was filed in the State of Idaho. The action was filed "very near the first of the year **1949"** (Tr. 491). Someone in Asbahr's office served the paper on Mary Elwert and made a return to the Idaho Court (Tr. 492).

Asbahr then testified that Elwert consulted with him about his account at the Pacific First Federal Savings & Loan Association, and testified:

> "He was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached, or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody." (Tr. 492).

A few days after that he went back to Maynard and made the change of the account from his own name to that of Schamburg and subsequently opened the two additional accounts under the name of "Albee" and "Albee or Bloomquist."

This evidence, which is part of the Government's case, establishes the reason for the opening of the accounts in the fictitious names in **1949.** It was clearly induced by the divorce litigation with his wife and the many difficulties that resulted

from their separation and the appropriation by his wife of the business bank accounts. He was obviously apprehensive about his wife attempting to sequester his own funds and attempted to conceal the bank accounts from her.

There is not a scintilla of evidence in the record that this maneuver on his part to thwart his wife, had any relation whatsoever to any attempted tax evasion or tax avoidance. This testimony in the Government's case utterly destroys any suspicion or inference that could be drawn from the bare fact that accounts were opened in assumed names. This is not a case where the fact of opening fictitious accounts stands alone and unexplained.

D

Re Bank Account in the Northeast Branch of The First National Bank.

Appellee indulges in the speculation that there is tax significance in the fact that the bank account in the Northeast Branch of The First National Bank was opened **January 14, 1947** (Tr. 104) and that checks were deposited or cashed through that bank account between **February 14, 1947, and May 5, 1947** (Appellee's Br., Table I, p. 65), or as appellee says, this took place during the "ides of March" or at "tax time."

There is not the slightest foundation for this speculation. The time element could have no tax significance because "tax time" (March 15, 1947),

did not relate to the income tax for 1947. It was tax time for the tax year **1946** and, therefore, could not have the significance claimed by appellee.

The Government's case establishes affirmatively that the opening of that account and the cashing of the checks through that account in that period of time was **coincident with and during the time of the trouble with Bloomquist which originated by the demand for $30,000.00 damages** (Tr. 211) in September 1946, the threat of litigation, and the commencement of the action for alienation of affections by Bloomquist against appellant. The Government's witness Asbahr testified that the lawsuit was commenced shortly after the threat (Tr. 211), (Handley, Tr. 155), (Bernstein, Tr. 210). The litigation was settled in **May 1947** (Bernstein, Tr. 211).

During that period of time, defendant could not sign any checks on the bank account of the Tualatin Valley Nursery (Bernstein, Tr. 21). The checks, which paid the attorneys' fees, were signed by Mary Elwert (Tr. 208). During that troublesome period, appellant's wife Mary withdrew from the business account of the firm in the Tigard Branch of The United States National Bank, the sum of $27,668.00 and with that amount opened an account in her own name at the same bank. This was on November 9, 1946 (Tr. 41). That account thereafter became the business account (Tr. 420).

Defendant's wife wrote a letter to the bank that it was not to pay any checks drawn by defendant (Tr. 456). Schmidt testified that the checks were cashed by defendant to meet his needs by reason of those troubles (Tr. 190).

These facts are established by the testimony of the Government's witnesses as part of the Government's case and utterly destroy the speculation indulged in by appellee's counsel.

The exculpatory evidence of the Government's witnesses establishes affirmatively the true connection between defendant's difficulties and the establishment and use of that bank account and the cashing of the checks through that bank account and through Schmidt. It was an expedient solely for the purpose of overcoming the difficulties resulting from the Bloomquist litigation and the seizure of the Firm's funds by his wife.

E

Re Capital Gains from Sale of Timber Land to Dant & Russell in 1948.

The transaction resulting in the 1948 capital gain was not concealed and could not be concealed. It was reflected in a written contract with a large corporation. The payments made under that contract were by check and the checks went through bank accounts. **The first payment under the contract totaling $27,592.98, and the $550.00 interest payment were deposited in the Tigard Branch of the**

United States National Bank in an account standing in the name of Mary and Leo Elwert. This was the same bank in which the Nursery account was maintained (Appx. 70, Appellee's Br.). $1047.43 interest payment on 99 W Motel Transaction was deposited in that account (Appx. 69, Appellee's Br.).

If Hammond had given consideration to the transactions that went through this account, he would have become aware of the sale of the timberland to Dant & Russell by reason of the deposit of the aforesaid checks. He is chargeable with knowledge of all the facts which inquiry would disclose and the transaction would have been reflected in the tax returns.

Hammond did not give any consideration to this bank account. He testified (Tr. 318):

> "MR. LUCKEY: Q. Did you consider the real estate account at the Tigard Branch in arriving at any of your income tax computations ?
> A. I don't think that I did."

Elsewhere in his testimony, which has already been referred to, he testified that the only bank accounts he considered were the Nursery account at that Bank and the bank account at the Sherwood Bank.

The Government's evidence establishes that Hammond had knowledge of the account.

Revenue Agent Menlow testified (Tr. 543):

> "Q. May I inquire whether or not you were

given by the accountant the **real estate account papers and books?**

A. At the time I obtained the records from Mr. Hammond it is my recollection the real estate account—part of the bank records for the real estate account were in with the records he gave me."

Hammond testified (Tr. 243-244):

"Q. As a matter of fact, there was also another account there that year, was there not, known as a real estate account in the name of Mary Elwert and Leo Elwert?

A. I don't recall it as having been in 1948, although it may have been. I do recall that account, however. I don't remember the year.

Q. So you do recall that there was a real estate account there in their names?

A. I don't know whether you would call it a real estate account or not. I don't remember how the bank statement was headed, but **I do remember a real estate transaction that went through that bank account.**

THE COURT: Which bank account are you speaking of?

A. That would be the U. S. National Bank at Tigard, I believe.

MR. MEAD: Q. **When you say 'that bank account,' you mean the real estate account, do you not?**

A. **Yes.**

. . . . .

Q. So the best you can say, Mr. Hammond, is that **you know there was such an account there?**

A. **Yes."**

He also testified (Tr. 270):

Q. **This was a bank account that you had knowledge of and these statements were avail-**

able to you, in any event, weren't they, during this period?

A. **Yes, possibly.**

Q. **That is a fact, isn't it, Mr. Hammond?**

A. **Well, whether they were made available to me—I suppose they were available to me."**

With respect to the availability of records, he testified (Tr. 327):

"Q. . . . I think you stated on redirect examination that when you went out there to the business office of the nursery **you helped yourself to whatever you needed. It was all available to you, was it not?**

A. **Yes, that is right.**

Q. All these records that you have described, including records that were available that you did not use, were all there had you wanted to take them?

A. Yes.

Q. These records that Mr. Luckey said were delivered to you, **actually you went out there and got them, didn't you?**

A. Yes, **there was very few records that were delivered to us. They may have been a few.**

Q. **But your practice was to go there during the entire time at the nursery and pick up what you needed; is that correct?**

A. **Yes, that is right."**

Any Revenue Agent examining the bank account would have become aware of that transaction and inquiry would have disclosed all pertinent facts relating thereto.

Revenue Agent Kuhn knew of the Real Estate account. He found the bank records among the records he obtained from Hammond (Tr. 543), and

he had no difficulty in obtaining all the facts pertaining to the capital gain transactions.

There is not a scintilla of evidence in the record that appellant did or said anything to conceal from Hammond the existence of the real estate account at the Tigard Branch of The United States National Bank. The records of that account were available to Hammond and as the evidence referred to above indicates, he knew of the accounts. He merely failed or refused to give that account any consideration and it is that failure that resulted in the omission of the transactions referred to from the returns.

This evidence in the Government's case dissipates any possible intent to conceal the transactions resulting in the capital gain.

F

Re Willfulness and Specific Intent to Evade the Tax.

The cases cited do not have the remotest bearing upon the questions involved in this case. Cases are cited in support of the proposition that willfulness can be inferred from concealment of income. But that is true only where there is no explanation for the apparent concealment other than attempted tax evasion.

In the case at bar, the Government's evidence dissipated such inference because the existence of the bank accounts under assumed names in 1949

upon which the contention of concealment is predicated, were fully explained by the Government's own witnesses which showed that the concealment of the accounts was from defendant's wife and from Bloomquist who was asserting a claim for damages against him. The existence of the bank account in the Tigard Branch of The United States National Bank (real estate account) was not concealed. It was known to the accountant and the records pertaining thereto were in his possession. Revenue Agent Menlow obtained these records from Hammond.

In the case of **Maxfield v. United States, 152 F. 2d 593,** cited by appellee, the concealment consisted of the **keeping of "2 sets of books—one for exhibition purposes only"** and "nothing in appellant's books indicated that they owned any property." In that case, it was also established that the taxpayer took deductions of $134,000.00 when there was no justification therefor.

In the case at bar, there were no two sets of books and the ownership and sale of the property which resulted in the capital gain, was ascertainable from the available records as already demonstrated.

The Government's case failed to establish "willfulness" and the specific intent to evade the tax because:

(a) Every suspicious circumstance was dissipated by the testimony of the Government's witnesses;

(b) The evidence establishes that there was in fact no taxable income in any of the three years;

(c) The evidence establishes that appellant failed to take many thousands of dollars of allowable deductions in all of the three years in question;

(d) The evidence establishes that appellant was unaware that the accountant Hammond had over-stated the 1949 income by $19,000.00 to $20,000.00;

(e) The Government's evidence establishes that the transactions carried through banks other than the regular business bank accounts, were devices to conceal the accounts and the transactions from (a) Bloomquist and (b) his wife;

(f) The Government's evidence establishes that the cashing of checks through Schmidt and other bank accounts was due to the fact that appellant was required to have large sums of cash to pay itinerant laborers and to the practice of paying cash for many purchases of supplies for the Nursery.

All of these facts, and many others, established by the Government's witnesses as a part of its case, dissipated entirely, as a matter of law, any suspicions or inferences of intent to evade the tax.

The **Remmer case, 205 F. 2d 277,** cited by appellee, involved a net worth case in which the taxpayer concealed his ownership of property, a safe deposit box and business licenses. These were material to the determination of his net worth at the end of the accounting period. The case did not in-

volve the alleged omission of specific items of income or the existence of allowable deductions. In that case, **the concealment was not explained away by evidence of the reasons therefor which would negative that the concealment was due to intent to evade the tax.**

Appellee argues that appellant "must have known" that the 1947 return was false. The test is not whether he "must have known," or "should have known," but whether he actually did know. Knowledge, which must form the foundation of the specific intent to defraud, **cannot be constructive** knowledge. It has to be **actual** knowledge. **(Hargrove case, p. 27 former brief.)**

It is asserted that the 1947 return bears "what purports to be" his signature and that this constitutes prima facie evidence that it was actually signed by him. It is upon this presumption that the inference of knowledge of the falsity of that return is predicated. No authority is cited in support of the assertion that such presumption exists. **In a criminal case, there can be no presumption of any fact essential to the establishment of the offense.**

But if we were permitted to indulge in the presumption claimed by appellee, the presumption only goes to the matter of the signature. Upon this presumption, appellee **imposes** the **further presumption or inference** that appellant knew the contents of the return and knew that it was false

and upon this second presumption, appellee **imposes a further presumption or inference** that the return was made with the intent to evade the tax. Thus, we have the typical case of the **pyramiding of presumptions upon presumptions or inferences upon inferences. (U. S. v. Litberg, p. 28 former brief.)**

G

Re Variance

The indictment did not charge any falsity in the partnership returns and it did not charge any falsity in the individual returns **insofar as it reported the taxpayer's distributive share of the partnership income.** The indictment and the Bills of Particulars all charged falsity in failing to report **additional individual income.** The evidence established that the items of unreported income relied on by the Government, were not appellant's **individual additional income.** The evidence established that all of the items represented partnership "receipts" (not income). This evidence would only involve the accuracy of the amount of the appellant's distributive share of the partnership income as reported in his return, as to which there was no charge of falsity. That evidence did not establish that appellant had **individual income** in addition to the share of partnership income shown in his return.

Appellee does not cite a single case in which a conviction was sustained against a partner on an

indictment which charged falsity with respect to his individual additional income and the proof consisted of evidence of falsity in partnership receipts. None of the cases cited by appellee under the heading of "Variance" even remotely touch the issue tendered by the appellant.

Appellant was denied the protection afforded him by the **Sixth Amendment to the Constitution of the United States** which requires that he "be informed of the nature and cause of the accusation", and the right to be tried on that accusation in the indictment only, and not on others. When defendant was tried on the issues of partnership income, he was not tried on the offense charged in the accusation. **He was denied due process of law.**

Appellee makes the concession that

> 'it would have been better form had the Bills of Particulars for the years 1947 and 1949 specified that the items represented unreported income of the partnership and that appellant's unreported income consisted of his distributive share which was one-half thereof."

But it is argued that the defendant was not injured.

We can conceive of no greater injury to a defendant charged with crime than to be **deprived of the constitutional guarantees designed to protect him.** If it was the intention of the Government to charge defendant with falsity in reporting his share of the partnership net income, then the indictment should have so charged.

III

Re Instructions Given and Refused

Appellee dismisses the issues raised with respect to the instructions given and refused with the generalization that the instructions given, as a whole, are adequate.

Appellee's brief does not question the legal soundness of the requested instructions or their applicability to the facts in the case at bar.

The questions raised cannot, however, be dismissed or glossed over by the generalities indulged in by appellee as will be readily apparent from the following illustrations:

a.

One specific objection is that the Court failed to include, as an "element" of the offenses charged in Counts I and II, (although specifically requested to do so—Tr. of Rec. 19) the requirement that at the time he filed the returns for the years 1947 and 1948 he "had the specific intent to evade the payment of a substantial part of the income taxes."

Although the Court omitted to instruct that the intent to evade was an "element" of the offenses charged under those two counts, the Court emphasized that the specific intent to evade was an element in connection wit hthe offense charged in the **third** count. The Court said:

> "The essential elements of the offense charged in Count 3, therefore, **are different,** and I will name them for you." (Tr. 855.)

The Court then enumerated the elements and as the fifth element (Tr. 856), instructed it was a requirement that:

> "The failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government."

Now that element was equally essential to the first and second counts. The effect of the Court's instructions was to confine this element to the third count. It was equivalent to saying that the specific intent was not an element under the first and second counts.

The Court later defined specific intent (Tr. 859), but it did not anywhere in the instructions indicate that the specific intent would be equally an essential element with respect to Counts I and II. In view of the limitation of intent to Count III, the general difinition of "intent" could only be applied by the jury in considering the existence of intent as to Count III.

There is further indication that the Court limited the element of intent to Count III in the following instruction given by the Court (Tr. 857):

> "You are instructed that **the failure to file** an income tax return and to pay the tax (Count III) does not constitute concealment or an attempt to conceal tax liability, even though the taxpayer may legally owe income tax to the Government. **To constitute concealment or an attempt to conceal** the Government must establish beyond a reasonable doubt that the defendant **committed some affirmative act** for the purpose of concealing his true net income and tax liability in addition to the failure to file the return, and **that it was with the specific intent to evade a tax liability legally due.**" (Matter in parenthesis supplied.)

In view of these limitations, all that the Court said with respect to the consideration of intent and how it to be determined, must have been construed by the jury as applying to Count III only and not to Counts I and II.

b.

Defendant requested an instruction that with respect to the existence of the specific intent to evade, the jury would be entitled to take into consideration the failure of defendant to take large allowable deductions in his income tax returns if they found, as a fact, that he did so. (Request No. 20, quoted p. 113, former brief).

Appellee argues that there was a sufficient instruction on this subject because the Court gave instructions to the effect that the jury would have to find that there was a **tax liability in fact** and that the **liability consisted of the difference between the gross income and the deductions allowed**

by law. (Appellee's Br. 50). This argument misses the point of defendant's contention.

The instruction that the jury would have to find that there was a tax liability in fact, did not dispense with the necessity of an instruction that the failure to take allowable deductions should be considered in determining the existence of specific intent to evade the tax.

The failure to take allowable deductions, is strong evidence of the non-existence of that intent, even though it may not entirely wipe out the tax liability.

The appellant was entitled to have the attention of the jury directed to that important matter.

c.

The portion of the instruction quoted at page 52 of Appellee's Brief, insofar as it deals with the element of intent, was again specifically limited to Count III for it deals with the matter of concealment in connection with the **failure to file a return (Count III) and the necessity of evidence of "affirmative" acts to constitute concealment.** This portion of the instruction cannot by any stretch of the imagination be said to apply to Counts I and II of the indictment.

d.

The United States Supreme Court did not in the **Spies case** decide or even intimate that inadequacy

or inaccuracy of records maintained by the taxpayer would constitute an offense, either under **subdivision (a) or (b) of Section 145.** What the Court held in that case was that willful attempt may be inferred from certain conduct. It gave certain illustrations of such conduct. But it did not include **inaccurate or inadequate records** which resulted from **carelessness** or **ignorance** of the taxpayer or his accountants or both.

These illustrations are sufficient to demonstrate that the specific issues raised by the exceptions to the instructions given and the refusal to give the requested instructions, cannot be disposed of or glossed over by generalities. They must be considered in relation to the specific subject matter involved in each instruction.

No instructions are to be found which covered the errors committed in the instructions as given or supplied the elements in the requested instructions which the Court did not give.

CONCLUSION

The judgment should be reversed with directions to enter a judgment of acquittal as to each of the counts of the indictment.

Respectfully submitted,

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